IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-01454

FRANKLIN CORPORATION **APPELLANT**

VS.

PAULINE TEDFORD, ET AL. **APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF CALHOUN COUNTY, MISSISSIPPI

BRIEF OF AMICUS CURIAE MISSISSIPPI ECONOMIC COUNCIL IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

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INTRODUCTION

"Don't take a fence down unless you know why it was put up."

-- John F. Kennedy

The MEC, with more than thirteen-hundred member companies, and nearly seven thousand individual members, is the State's Chamber of Commerce, "the voice of business" in Mississippi. Since its founding in 1949, the MEC has worked to furnish those charged with making and implementing the State's laws with the information they need to make good decisions on questions that affect Mississippi businesses, and the people whose livelihoods depend on those businesses. The MEC respectfully submits that this brief will assist this Court in seeing, from the perspective of Mississippi business (and, indirectly but no less truly, their employees taken as a whole) why the Trial Court's attempt to overrule *Peaster v. David New Drilling Co., Inc.*, 642 So. 2d 344, 348-349 (Miss. 1994) (refusing to adopt "substantially certain" test), would be bad for both workers and employers.

ARGUMENTS AND AUTHORITIES

I. The "substantial certainty" test is bad for workers, because it undermines the biggest single piece of pro-worker legislation ever enacted in the State of Mississippi.

In the case at bar it is the employer that is invoking the Mississippi Worker's Compensation Act, as a defense. This makes it easy to miss the most important aspect of the entire case: the Act is the biggest single piece of pro-worker legislation ever adopted in this state, and the "substantial certainty"

rule would, as a practical matter, deprive countless employees of the Act's benefits.

Worker's compensation statutes were not employer-protection statutes. They were enacted largely in response to demands from workers, who were increasingly dissatisfied with the tort system.[1] When the great progressive Teddy Roosevelt outlined the "Square Deal" -- his program for widespread economic reform -- in the same breath that he called for "laws to regulate child labor and work for women" he also called for "comprehensive workmen's compensation acts . . . ."[2]

Typical of the worker-oriented indictments of the tort system was a 1912 doctorial dissertation titled *History of Work Accident Indemnity in Iowa.*[3] The author observed, first, that "[t]he existing system of employers' liability . . .

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[1] P. V. Fishback & S. E. Kantor, *A Prelude to the Welfare State: The Origins of Workers' Compensation* 12 (University of Chicago 2000). American labor demands for workers' compensation laws go back at least to 1897. *See* O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 466-67 (1897) ("Since the last words were written, I have seen the requirement of such insurance put forth as part of the programme of one of the best known labor organizations").

[2] T. Roosevelt, *The New Nationalism* (Aug. 31, 1910), *in* 13 *The Annals of America* 250, 253 (Encyclopedia Britannica, Inc. 1976). *See generally A Prelude to the Welfare State: The Origins of Workers' Compensation, supra* note 1, at 1 (Worker's Compensation "was by far the most successful form of labor legislation proposed by the Progressive Movement in the early 1900's").

[3] E.H. Downey, *History of Work Accident Indemnity in Iowa* (Benjamin F. Shambaugh ed., State Historical Society of Iowa 1912). *History of Work Accident Indemnity* is just one of many similar works; as of its writing, "commissions to investigate the question and recommend legislation ha[d] been appointed by twenty-four States and by the Federal government." *Id.* at 107. The history, composition, and findings of one such commission are set forth in *Ives v. South Buffalo Railway*, 201 N.Y. 271, 284-85, 94 N.E. 431, 435-36 (1911).

denies indemnity for all but a small minority of work accidents . . . ."[4] Many, reluctant to antagonize their employers with a lawsuit, accepted whatever the employer's charity moved him to offer.[5] The worker who sued often could not prove employer fault,[6] and if he could he was nevertheless faced with robust employer defenses -- contributory negligence, assumption of the risk, and the fellow-servant rule.[7] And if he obtained a judgment, the amount was often arbitrary,[8] always significantly reduced by attorneys' fees,[9] and seldom timely:

> **The [tort] system . . . grants relief, when at all, only after delays that often make the final recovery a little better than none.** It is immediately following an industrial injury, when medical and funeral expenses are to be met and when the ordinary wage income has been cut off, that aid is most needed by the stricken family. After a few months, when the sufferer has died or returned to work, when the mother and the older children have found employment, and when the family budget has been re-adjusted to a diminished income, the need is much diminished. Yet settlement through the courts

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[4] *History of Work Accident Indemnity, supra* note 3, at 78. One survey of 258 worker deaths found that the families of 59 "received nothing whatever from the employer, [and] 65 were paid bare funeral expenses. . . ." *Id.* at 73. In another survey, "the dependents of 70 out of 149 victims of fatal work accidents, were wholly uncompensated. . . ." *Id.* at 74.

[5] *Id.* at 85-86 ("to file suit is to provoke the resentment of the employer . . . more than the ordinary bitterness of law-suits").

[6] Many industrial accidents, the reformers noted, are an unavoidable fact of industry:

> Every mechanical employment has a predictable hazard: of a thousand men who climb to dizzy heights in erecting steel structures a certain number will fall to death, and of a thousand girls who feed metal strips into stamping machines a certain number will have their fingers crushed.

Id. at 5.

[7] *Id.* at 17.

[8] *Id.* at 80 (giving numerous examples including "[o]f six men totally disabled for life in Minnesota one received $150, one $175, one $4,500, and three got nothing").

[9] *Id.* at 82-83 (examining New York experience, in which workers and their families received only forty two cents of every dollar spent by employers on lawsuits).

> frequently is delayed until the economic consequences of the death or disability have worked out their worst results and the evil is beyond repair.[10]

Summing up, the *History of Work Accident Indemnity* denounced the tort system as "a gamble . . . on the same level as faro":

> An indemnity system which tediously grinds out such results as these is no better than a gamble -- **a gamble** which awards a few prizes to injured persons and deludes all other injured persons into thinking they are going to draw prizes, too, when, as a matter of fact, they are going to draw blanks; a gamble which makes the employer pay preposterous sums to certain people and so prevents him from paying reasonable sums to all. It is **on the same level as faro.**[11]

More than three decades later, when the Mississippi Legislature decided to join the reform movement,[12] these critiques of the tort system were received wisdom;[13] these ills were the ones that the Legislature intended to ameliorate. We see this clearly in a legal article that appeared shortly after the Mississippi Act was passed, *An Introduction to the Mississippi Workmen's Compensation Law*,[14] which examined the Act in depth and then extolled its advantages.

The first and great advantage of the Act, the article noted, was that it guarantees to every injured worker an "absolute" right to timely compensation

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[10] *Id.* at 78-79 (emphasis supplied).

[11] *Id.* at 80 (emphasis supplied; internal quotation marks omitted).

[12] The year was 1948. "Mississippi was the last of the 48 states to enact a compensation statute." *Walters v. Blackledge*, 220 Miss. 485, 501, 71 So. 2d 433, 437 (Miss. 1954).

[13] *See generally A Prelude to the Welfare State: The Origins of Workers' Compensation, supra* note 1, at 11 ("Reformers decried the common law system" for uncompensated injuries, "uncertain and unequal payouts," high transactional costs, and delay).

[14] J. C. Satterfield, *An Introduction to the Mississippi Workmen's Compensation Law*, 20 Miss. L. J. 27 (1948).

"fixed" in amount.[15] Almost as important, unlimited "medical aid and hospital services" are provided immediately.[16] Too, the Act makes lawyers unnecessary in many cases, and regulates their fees when they are needed.[17] Finally, by making fault irrelevant, the Act makes it possible for a worker to be compensated without antagonizing his employer.[18]

None of this is to say that the employer received nothing from the historic "bargain" embodied in a compensation act. Most notably he received the invaluable knowledge that his liabilities would be limited and insurable (an important point to which we shall return).[19] But compensation acts, taken as a whole, were undeniably "radical" and "revolutionary" pro-worker reform measures.[20]

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[15] *Id.* at 34.

[16] *Id.*

[17] *Id.* at 44. Although it may seem, to lawyers and judges, that this goal was not realized, the Commission reports that over 80% of lost time cases are uncontested. Mississippi Workers' Compensation Commission, *Annual Report Cumulative Information Tables*, *at* http://www.mwcc.state.ms.us/info/_annreportcumu.asp ("Total Claims by Year") (last visited Mar. 12, 2008).

[18] *See An Introduction to the Mississippi Workmen's Compensation Law*, *supra* note 14, at 30-31.

[19] J. G. Jones, *Mississippi Workers' Compensation: Mississippi Practice Series*, 76 Miss. L. J. 1101, 1105 (Spring 2007) (book review) ("the 'bargain' at the heart of all compensation systems: The employer gives up fault defenses in exchange for tort immunity and a cap on liability he can then insure; the employee gives up a complete remedy at law in exchange for swift but certain no-fault recovery allowing him to subsist until he is physically able to return to wage-earning").

[20] *An Introduction to the Mississippi Workmen's Compensation Act*, *supra* note 14, at 30 ("The theoretical basis of workmen's compensation legislation is radically different from the theoretical basis of common law liability"); V.S. Dunn, *Mississippi Workmen's Compensation* § 2 (3d ed. 1982) ("radical departure from the common law"). Indeed, the compensation statutes were so radical that courts at first struck them

(*footnote continued*)

Every measure that invites the injured worker to abandon the compensation system, and return to what reformers called "a gamble . . . on the same level as faro," wars against the purposes of the Act. Yet this is precisely the invitation that the Trial Court issued when it adopted the "substantial certainty" test for the intentional tort exception.[21]

Such an invitation is a seductive one: many are called. When the Connecticut Supreme Court adopted the substantial certainty test it confidently predicted that doing so would not "encourage significant additional litigation," because "only in those rare instances when an employer's conduct

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down as unconstitutional. *See, e.g., Ives v. South Buffalo Rwy.*, 201 N.Y. 271, 94 N.E. 431 (1911) ("radical" and "revolutionary" worker's compensation act deprived employer of property without due process of law).

[21] Created in *Miller v. McRae's, Inc.*, 444 So. 2d 368 (Miss. 1984). While it is not necessary to revisit *Miller* in order to reach the right result in the case at bar, it is worth noting that the *Miller* Court relied principally on a case that had already been implicitly overruled, *Smith v. Rich's Inc.*, 104 Ga. App. 883, 123 S.E.2d 316 (1961). *Smith*, cited as "controlling" case of *Fowler v. Southern Wire & Iron, Inc.*, 104 Ga. App. 401, 122 S.E.2d 157 (1961), but *Fowler* was reversed a year after *Smith* was decided. *Southern Wire & Iron, Inc. v. Fowler*, 217 Ga. 727, 124 S.E.2d 738 (1962). *See generally Southwire Co. v. Benefield*, 184 Ga. App. 418, 419, 361 S.E.2d 525, 526 (1987) ("*Smith* can no longer be considered controlling authority"; "when an employee's injuries are compensable under the Act, he is absolutely barred from pursuing a common law tort action to recover for such injuries, even if they resulted from intentional misconduct on the part of the employer").

It is worth noting, too, that the *Miller* Court was almost certainly not addressing a point overlooked by the Legislature, but overruling the Legislature's conscious, policy-driven choice between competing alternatives. We say this because the three generations of debate on the subject quickly detected the intentional tort issue. As of 1912 the compensation statutes in eight States "grant[ed] additional compensation, or additional rights of action, for injuries caused by the employer's violation of the safety acts or by his personal gross negligence or deliberate intention to cause injury." *History of Work Accident Indemnity, supra* note 3, at 112 (footnotes omitted). No one can credibly maintain that the Mississippi Legislature was not fully aware of its option to create an exception for intentional torts, and fully aware of the arguments pro and con. Even today, ten States have no intentional tort exception. 6 Arthur Larson & Lex Larson, *Larson's Workers' Compensation Law* § 103.01 n.4.

allegedly falls within the very narrow exception to the act will such litigation result." *Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99, 117-118, 639 A.2d 507, 516 (Conn. 1994). In the fourteen years since the *Suarez* opinion was issued, *Suarez* has been cited, according to Westlaw, over *twelve hundred* times.[22] Michigan has had much the same experience.[23] The reporters are filled with cases from the handful of "substantial certainty" States (Professor Larson counts twelve[24]) in which classic industrial accidents were, allegedly, "substantially certain" to have happened.[25] (All of these workers, by the way, ran the risk of permanently poisoning relations with their employers.)

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[22] The first one hundred (counsel for MEC had not the heart to read further) were all Connecticut cases, so it is not as if *Suarez* has been of interest only to courts outside of Connecticut interested in the issue.

[23] "Within weeks of the decision, scores of intentional tort claims had been filed for workplace injuries; within months, the courts had hundreds of case filings. To some extent, plaintiffs' attorneys representing workers injured on the job were obligated to file these suits in order to avoid possible malpractice claims. **The Michigan Supreme Court had opened a litigation door so wide that it was impossible for attorneys not to enter.**" J. O. Skoppek, *Destroying Traditional Exclusive Remedy Balance: Circumventing Workers' Compensation through Intentional Tort Claims, in Litigation and the Market: Restoring the Balance Between Individual and Employer Rights, at* http://www.mackinac.org/article.aspx?ID=6272 (last visited Feb. 13, 2008) (emphasis supplied).

[24] 6 *Larson's Workers' Compensation Law, supra* note 21, § 103.04[1].

[25] A single example: *Sibert v. City of Columbus*, 68 Ohio App. 3d 317, 320, 588 N.E.2d 252, 254 (1990) (employee working in excavated area; "chunk of asphalt dislodged from the northeast wall and struck plaintiff's back"; *held:* jury could find that injury was "substantially certain"). An advocate for the worker could (and obviously did) paint these facts in such a way as to persuade a court, but few disinterested observers can regard this injury as anything but a classic example of the kind of industrial accident that the compensation law was intended to address. Imagine how quickly a sanctions motion would have been filed had the worker sought compensation benefits, and the carrier defended by asserting that the accident was *not* within the scope of the statute! *See also Sullivan v. Lake Compounce Theme Park, Inc.*, 889 A.2d 810 (Conn. 2006) (amusement park employee directed to cut grass under

(*footnote continued*)

Many are called, but few are chosen. Mr. Suarez, whose counsel persuaded the Connecticut Supreme Court to adopt the "substantial certainty" rule, received exactly nothing; [26] countless others accepting the invitation to take "a gamble. . . on the level of faro," have received exactly what Mr. Suarez received.[27] Yet the plain intent, and the great *desideratum,* of the Act, was that no injured worker should go wholly uncompensated.[28]

Some, of course, will recover something, even after paying attorneys and experts, but usually only after the long period of time that so troubled the

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roller coaster before park opened; test run of coaster strikes and kills him). The *Sullivan* opinion cites four other very similar cases, in which classic industrial-style accidents were alleged to have been substantially certain.

[26] *Suarez,* 229 Conn. 99, 639 A.2d 507; *Suarez v. Dickmont Plastics Corp.*, 242 Conn. 255, 698 A.2d 838 (Conn. 1997).

[27] *See, e.g., Sullivan,* 889 A.2d 810, and the four cases cited therein, all holding for the employer as a matter of law, despite the substantial certainty test.

Note, too, that at least some who obtain a judgment will find it uncollectible, the employer being insolvent, and the employer's CGL carrier invoking the ubiquitous exclusions for intentional misconduct and for "bodily injury to any employee of the insured arising out of and in the course of his employment by the insured . . . ." C.E. Hagglund, et al., *CGL Policy Handbook* § 6.01[B] (2000). *See, e.g., Rapid Leasing, Inc. v. Nat'l Am. Ins. Co.,* 263 F.3d 820, 827 (8th Cir. 2001) (finding this exclusion unambiguous and applicable as a matter of law). *Cf. An Introduction to the Mississippi Workmen's Compensation Law, supra* note 14, at 34 (under tort system, "[c]laims were frequently abandoned or compromised for small amounts because of lack of [insurance] coverage"). In at least two States the obvious insurance problem created by the substantial certainty test required legislative action, the efficacy of which is unclear. S. Paige Burress, Comment, *The Intentional Tort Exception to the Exclusivity Provision of Workers' Compensation: A Comparison of West Virginia and Ohio Law,* 18 Ohio N.U.L. Rev. 273, 283, 292 (1991).

[28] "The entire [compensation] system," this Court noted, "was designed to insure that those injured as a result of their employment would not be reduced to a penniless state and thereby become dependent on some form of governmental public assistance." *Miller,* 444 So. 2d at 370.

original reformers.[29] And during that period most, with little or nothing in the bank, will live in genuine hardship. Medical care will be not a given but a luxury.[30]

Does the "substantial certainty" test offer some advantage great enough to outweigh all of these disadvantages? When the Michigan Supreme Court took the plunge, the only real rationale it could offer was that "[p]rohibiting a civil action in such a case [i.e., where injury was substantially certain], 'would allow a corporation to "cost-out" an investment decision to kill workers.'" [31] This is at once cynical, nonsensical, and naïve.

It is cynical to suggest that employers as a class are so crazed with greed that they would gladly kill and maim their employees if only it were profitable to do so.[32] It is nonsensical, because in many cases the same conduct that

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[29] Justice McRae, ironically, made the point in *Peaster v. David New Drilling Co., Inc.*, 642 So. 2d 344, 350 (Miss. 1994) (McRae, J., dissenting), when he complained "ten years after his death, Jimmy Wilcoxson's heirs are still in court." Mr. Suarez was injured in 1986; even if the jury verdict in his favor had been affirmed he would not have received any payment at all until 1997. *Suarez v. Dickmont Plastics Corp.*, 242 Conn. 255, 698 A.2d 838 (1997). Examples could be multiplied almost endlessly.

[30] To accept free medical care from the employer/carrier would be to risk an election of remedies. *See Lamar v. Thomas Fowler Trucking, Inc.*, 956 So. 2d 878, 882 (Miss. 2007).

[31] *Beauchamp v. Dow Chem. Co.*, 427 Mich. 1, 25, 398 N.W.2d 882, 893 (1986) (quoting *Blankenship v. Cincinnati Milacron Chem. Inc.*, 69 Ohio St. 2d 608, 617, 433 N.E.2d 572 (1982) (Celebrezze, J., concurring)). Another rationale offered in Ohio was that "for occupational diseases incurred in the work place, such as appellant's chemical poisoning, there is no workers' compensation paid unless there is total disability." *Blankenship*, 69 Ohio St.2d at 618, 433 N.E.2d at 579 (C.F. Brown, J., concurring). This is simply not true in Mississippi.

[32] Mississippi law does not even suspect the average man of a propensity for bloodless, merely economic, chicanery. To the contrary, "[t]he prima facia presumption is that all persons act honestly," *Metropolitan Life Ins. Co. v. Hall*, 118 So.

(*footnote continued*)

was (or so we are told, in hindsight) "substantially certain" to injure the employee was also "substantially certain" to ruin the employer — destroying his entire plant, for example. *See, e.g., Mayer v. Valentine Sugars, Inc.*, 444 So. 2d 618, 621 (La. 1984) ("[T]he substance of plaintiffs' petition and amended petitions, even as skillfully and artfully drawn as they are, is that the courts are urged to believe that the defendants *intended* to blow up the plant. Since such a conclusion is patently absurd, the petition does not state a cause of action.") (Watson, J., dissenting). "This," Professor Larson states quite rightly, "defies common sense."[33] And it is naïve, because the "cost[ing]-out" process decried as an avoidable anomaly, attributable to the true intentional tort standard, is in fact an unavoidable feature of modern life, attributable to industrialization. Under any system employers (and workers) will -- must -- make choices about what risks are worth taking. Indeed, the whole modern compensation system represents an elaborate "cost[ing]-out process."

Replete with disadvantages and providing no true benefit for workers, small wonder that where judges have experimented with the substantial certainty test, contrary legislation -- in at least one State "the legislature amended the [worker's compensation] statute . . . *with the willing and eager support*" of the AFL-CIO[34] -- has swiftly followed.[35]

826, 827 (Miss. 1928), and for this reason, one who wishes to subject another to liability under a fraud theory must prove each element "by clear and convincing evidence," *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 762 (Miss. 2004).

[33] 6 *Larson's Workers' Compensation Law*, *supra* note 21, § 103.04[4] (citing *Mayer*, 444 So. 2d 618).

[34] *Mayles v. Shoney's, Inc.*, 185 W. Va. 88, 98, 405 S.E.2d 15, 25 (W. Va. 1990) (Neely, C.J., dissenting) (emphasis original).

II. The "substantial certainty" test is bad for employers, because it deprives them of much of the Compensation Act's *quid pro quo*.

The substantial certainty test is bad, not just for workers, but for their employers as well. It was "an economic disaster" in West Virginia,[36] but more importantly, it is fundamentally unfair. The exclusive liability rule is the *quid* for the *quo* of liability without fault – a *quo* that costs Mississippi employers, directly and through insurance policies funded by them, over three hundred million dollars per year.[37] Without exclusive liability, a compensation act might be unconstitutional;[38] it would certainly be unjust. This Court ought not to consider demands for attenuating the exclusive liability rule from any party that does not candidly confess how important the exclusive liability rule is, and how absolutely compelling must be any case for narrowing it.

CONCLUSION

The compensation system is a fence between injured workers and the tort system. The Legislature put it up to protect workers as a group from the

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[35] B.W. Wolkinson & R.N. Block, *Employment Law: The Workplace Rights of Employees and Employers* 210 (Blackwell Publishers 1996).

[36] *Mayles*, 185 W. Va. at 98, 405 S.E.2d at 25 (Neely, C. J., dissenting).

[37] Mississippi Workers' Compensation Commission, *Annual Report Cumulative Information Tables, at* http://www.mwcc.state.ms.us/info/_annreportcumu.asp ("Total Compensation and Medical") (last visited Mar. 12, 2008).

[38] *See Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 P. 554 (Mont. 1911), as summarized in *Kentucky State Journal Co. v. Workmen's Compensation Board*, 170 S.W. 437, 439 (Ky. 1914) (Miller, J., dissenting) (Montana compensation act unconstitutional because "it denied the employer the equal protection of the laws, in that the compensation system was as to him exclusive, while the employé might, after receiving the injury, elect" to sue in tort).

very evils that would flow from a "substantial certainty" test. This Court should not countenance the Trial Court's attempt to take it down.

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CERTIFICATE OF SERVICE

I hereby certify that I have on 14, March, A.D. 2008, served a copy of the foregoing on all known counsel of record by placing same in the United States Mail, first class postage prepaid and properly addressed as follows:

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